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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-109

JACK LIVINGSTON, ET AL.,
Respondents,

vs.

HARLEY SWANQUIST, ET AL.,
Petitioners.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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This responding brief is written at the request of this Court. In response, while we take quite serious exception to many of the characterizations and distortions made by Petitioners in regard to the facts of this case,[1] a detailed statement at this stage is unnecessary for the essential facts are simple. Suffice it to say that the Defendant School

1. For example, contrary to Petitioners' assertions, we believe the code to be both unreasonable and exceedingly arbitrary. Similarly, we not only strenuously object to Petitioners' characterization of these boys as displaying "a strong desire to abolish all restraint and all discipline," but find it somewhat anomalous for a School Board which was told by its own attorney that the code was unconstitutional, but nevertheless decided to enforce the code and deprive these boys of their education, to accuse anyone of, in effect, being lawless. Finally, Petitioners' attempt to contrast "the long haired students and the normal students" relies on Petitioners' own distorted sense of normalcy not ours.

Board enacted a dress code in November 1969 which, *inter alia,* limited the length of hair to be worn by male students. This code was enacted and enforced even though there was no evidence prior to its enactment of long hair causing any disruption in any classroom or posing any danger to health or safety. After the code's enactment, a group of students whose hair fell below the School Board's standards were ordered to leave school and not return until their hair was considered appropriate, *i.e.,* not below the top of their collars, nor covering any part of their ears. Jack Livingston and Tim Hellberg refused to have their hair cut, and despite numerous efforts on their part to be re-admitted to school and the advice of the school board's own attorney that the code was unconstitutional, they were not re-admitted until they brought suit in federal district court.

That court was later to rule that they had no constitutional right to wear their hair at any length. This decision was reversed on appeal by the Seventh Circuit on the basis that students have such a constitutional right and that the evidence in this case, consisting entirely of the testimony of so-called "experts" on the effect of long hair on the learning environment, was insufficient to deprive these two students of their fundamental liberties. There was, as previously mentioned, a complete absence of any disruptive behavior either by these two students or in any way related to the length of their hair.

While Petitioners present for review numerous issues, in reality, the two basic issues are:

1. Whether students have a constitutional right to wear their hair at any length; and,

2. Whether the evidence in this case, based entirely on the testimony of so-called "experts," is sufficient to deprive students of their constitutional rights.

As Petitioners have pointed out, there exists a serious conflict among the Circuits on the first issue. Thus, in *Richards* v. *Thurston,* 424 F. 2d 1281 (1st Cir. 1970), and in several Seventh Circuit decisions, *Breen* v. *Kahl,* 419 F. 2d 1034 (7th Cir. 1969), *cert. denied,* 90 S. Ct. 1836 (1970); *Crews* v. *Cloncs,* 432 F. 2d 1259 (7th Cir. 1970), the First and Seventh Circuits have found such a constitutional right to exist. Decisions in the Fifth, Sixth and Ninth Circuits have taken a contrary position. *See, e.g., Wood* v. *Alamo Heights Independent School District,* 433 F. 2d 355 (5th Cir. 1970); *Jackson* v. *Dorrier,* 424 F. 2d 313 (6th Cir. 1970); *Olff* v. *Eastside Union High School District,* ..... F. 2d ..... (9th Cir. 1971).

Similarly, there exists a conflict between the Seventh and Ninth Circuits on the adequacy of such expert testimony, as presented here, to vitiate this constitutional right. *Compare, Livingston* v. *Swanquist* ..... F. 2d ..... (7th Cir. 1971) and *Crews* v. *Cloncs,* 432 F. 2d 1259 (7th Cir. 1970) *with King* v. *Saddleback Junior College District,* ..... F. 2d ..... (9th Cir. 1971) and *Olff* v. *Eastside Union High School District,* ..... F. 2d ..... (9th Cir. 1971).

Moreover, litigation such as this has inundated, as Petitioners have noted, courts in every Circuit and a decision by this Court would, one way or the other, end this flood of litigation which is costly not only to school boards but to private litigants as well.

Finally, that these issues present important questions to be decided by this Court is not only underscored by this significant amount of litigation, but by the constitutional rights that these two students have asserted. Certainly, in a long line of cases, this Court has time and again protected the constitutional rights of students from the arbitrary inroads of school boards. *See, e.g., Tinker* v. *Des Moines Independent Community School District,* 393

U. S. 503 (1969); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). While the narrow interests of Jack Livingston and Tim Hellberg might direct that the petition for certiorari be opposed, they believe, and we concur, that larger interests are involved here, interests not only of judicial economy, but of protecting students, such as themselves, from the capricious and unreasonable abuses of school boards. As this Court noted in *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960): "The vigilant protection of constitutional rights is nowhere more vital than in the community of American schools." Thus, we submit that this case is an appropriate one for the granting of certiorari and, therefore, do not oppose Petitioners' request.

Respectfully submitted,

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